03 The legal background to employment LEARNING OUTCOMES 03 The legal background to employment LEARNING OUTCOMES After reading this chapter you will: Know which legislation is likely to apply in the main areas of HR activity. Be able to discuss relevant legislation and requirements in discussions with managers and legal specialists. Be able to respond to the fundamental legal expectations placed on employers. Recognise the limitations of your knowledge and know where to find further information. Have an understanding of the basic employment legislation affecting HR practice, including employment contracts, individual employment rights, equality, diversity and inclusion, and ending the employment relationship. Introduction In this chapter we'll be considering the legal framework that underpins and regulates the formal employment relationship between employers and their employees and workers. First we'll consider why employment legislation is important for HR practitioners, how employment legislation is made and where it comes from. Next we'll use the concept of the employee life cycle as a framework to consider what legislation is relevant whilst recruiting, selecting and appointing employees (see Pre-employment and starting work), then how employment legislation impacts during employment, with a particular focus on individual employee rights, and finally what legislation is relevant as the employment relationship comes to an end (see Ending employment). We will then end by looking at how disputes about employment rights and legislation are dealt with and the role of HR practitioners. Whilst considering the impact of employment legislation on the formal employment relationship it is also important to be aware that legislation and other statutory regulation (areas that you may come across later in your HR career) also plays a much wider role in the employment field. This is often influenced by political, social and economic changes in society more widely – think about the requirement for gender pay gap reporting that now applies in many organisations. Consider the impact free movement of people around the EU has had on recruitment practice and cultural equality and diversity and what will happen when this free movement comes to an end. Why is legislation important? In the employment relationship there is usually an imbalance of power – in favour of the employer. Having employment legislation in place ensures this imbalance is not exploited and regulates the employment relationship. It affords rights to employees that, in some organisations, may not otherwise exist. Employment law also serves to reinforce values in society and create workplace cultures that support the direction of travel in the wider world – think, for example, of the evolution of equality law from a narrow focus on sex and race discrimination to a much wider focus now, mirroring societal changes. For example, equality law now applies to sexual orientation and gender reassignment. Many employers view employment legislation as a helpful framework to refer to when managing employees, although some feel that bringing the law into employment relationships creates rigidity and sometimes makes it difficult for the business to be agile and respond to opportunities. Employees often feel that the law provides a degree of protection from poor management and exploitation, such as in the recent debates about zero-hours contracts, but doesn't necessarily go far enough. Many other feelings surround the question of law and employment. Some may arise from political beliefs, others from personal experience. In recent years there have been attempts by successive governments, not entirely successful, to reduce the burden of legislation on employers. However, after the United States, employment in the UK is one of the most lightly regulated regimes in

the developed world. The extent to which strong feelings exist, and their relevance to HR practice, varies from organisation to organisation. Government organisations necessarily attach great importance to legal matters, whereas some entrepreneurial businesspeople may seek to minimise, or even disregard, the impact of the law on their employment practices. Other employers adopt employment practices that go over and above any minimum provided by the law. They aspire to practices that are the best that can be found, embracing the spirit as well as the letter of the law. One example, common in many larger employers, is having more generous maternity leave and pay than required by law. Knowledge and understanding of employment legislation, and its impact, is a key competence for HR practitioners and business-owners/managers alike. The law has a bearing across many areas of HR practice – recruitment, reward, employee relations, change management, wellbeing and performance management, to name a few. It is a huge area that changes rapidly and can, at times, be very specialised and complex. So, in this chapter, although we shall explain the main principles that you need to know, you are likely also to need advice from more senior colleagues, Acas, or legal and other specialists. There are more details about Acas in Chapter 2. Reflective Activity 3.1 Think about your own organisation. How do you think managers and workers view the effect of law on employment? Do managers use it to control or manage people? If so, how? Do employment rights reassure employees? What do you think of the attitudes in your organisation? Write down your thoughts and discuss them with one of your learning sources, as described in Chapter 1. A note on employees and workers You will notice that we have already used the terms 'employees' and 'workers' and have mentioned the 'employment relationship' many times. The definition of 'employee' and 'worker' is not always consistent in different pieces of legislation, but in general, the rights we are going to talk about in this chapter only apply to either employees or workers – and not, for example, to self-employed people. The majority of people in work will be employees, but the distinction between employees and workers is important because different rights apply to each. In broad terms, employees have more rights than workers, and legislation that applies to workers will normally also apply to employees, but not necessarily vice versa. The intention behind the distinction is to ensure that some rights, although not all, will apply to less typical employment arrangements such as casual workers, zero-hours workers, 'as and when required' workers, and some other types of subcontractors. There is more on this below. Where does employment legislation come from? In the UK, current employment law has come from three different places: The UK Parliament – primary legislation (Acts of Parliament, for example, the Equality Act 2010) and secondary legislation (Regulations, for example, the Working Time Regulations 1998). Tribunals and courts through case law (for example, the Employment Appeal Tribunal or the Supreme Court). European bodies (for example, the European Parliament and the European Court of Justice). Acts of Parliament generally start out as White (broad statements of policy) or Green (specific proposals and options) Papers and Bills. They will be subject to consultation with interested parties and debate in Parliament. At the early stages of new employment legislation, consultation will often be conducted by the Department for Business, Energy & Industrial Strategy (BEIS). Once the full parliamentary process has taken place, then new legislation will appear in the form of an Act. Often for Acts relating to employment matters, there will be a phased introduction of different clauses or parts of the Act, although they will also have a

formal enactment date – in the case of employment legislation usually April or October. Some of the key Acts of Parliament that apply in the employment relationship include the: Trade Union and Labour Relations (Consolidation) Act 1992. Employment Rights Act 1996. Employment Act 2002. Work and Families Act 2006. Employment Act 2008. Equality Act 2010. Children and Families Act 2014. The situation is somewhat different in relation to law that originates from the tribunals and courts – properly termed 'common law'. This common law evolves over time as cases are brought to tribunals and courts and judges make decisions or are asked to interpret a particular piece of primary or secondary legislation. Decisions by judges in higher courts must be applied by judges in lower courts. So, for instance, if an employee takes an unfair dismissal case to an employment tribunal and wins, but the employer then appeals and the case is heard by the Employment Appeal Tribunal, which overturns the decision, then in future cases of the same nature, all employment tribunals must apply the ruling/interpretation as set out by the Employment Appeal Tribunal. Common law can be overturned by a subsequent Act of Parliament. Common law is particularly important in the field of employment legislation and decisions from employment courts lead to an almost constant evolution in employment law that anyone involved in HR must be aware of. In relation to laws that originated from the European Union, there have been three main sources, which to some extent reflect the two UK-based sources outlined above. These are: Treaties which are directly enforceable in Member States (for example, the Treaty of Rome 1957, which contained the principle of equal pay for equal work). Directives which require further relevant national laws to be passed by Member States – in the UK by an Act of Parliament (for example, the European Working Time Directive was enacted as the Working Time Regulations in the UK). Rulings of the European Court of Justice, which are binding on all Member States (which, for example, led to the definition of discrimination on the grounds of pregnancy as 'direct discrimination'). It is possible to see the interaction of laws from these different sources by considering the area of working time – maximum allowable working hours per week, rest breaks, paid holidays, and so on. The European Commission introduced the Working Time Directive (WTD) in 1993. The stated aim of the WTD was to ensure the health and safety of workers and safeguard workers' rights. As a European Union (EU) Directive, it required Member States, including the UK, to enact or pass it into national law. After some reluctance in the UK, the WTD was enacted as the Working Time Regulations (WTR) 1998. These Regulations have subsequently been amended a number of times by the UK Parliament. As indicated above, as this originated in the EU and was then enacted in the UK via Regulations, this is a piece of secondary legislation. Since 1998, the WTD and WTR have been subject to a number of challenges through both UK courts and tribunals and through employment courts in other EU Member States and, ultimately, through the European Court of Justice. As challenges have been made through UK courts and tribunals and judges in these institutions have interpreted the WTR they have made decisions which must be followed in lower courts, thus Common Law about working time has been created. So, now, employers must be aware of legislation from each of the three sources identified above, and be aware of which takes precedence, when considering matters relating to working time. A complex and complicated area of HR practice we're sure you'll agree! The position is also made more complicated by the decision for the UK to leave the EU, with the processes involved to deliver that being

uncertain at the time of writing. For the foreseeable future, EU law that existed before Brexit will continue to apply after Brexit until such time as that law is changed in the UK Parliament. Reflective Activity 3.2 Consider the question of paid holiday entitlement for workers. Do some research and try to find out: How much paid holiday workers in the UK are entitled to. How bank holidays are treated. What is included in the calculation of 'pay' when working out holiday pay. What happens to holiday entitlement during sick leave and other types of leave (for example, maternity leave or shared parental leave). Can you work out where the current rules on each of these matters come from – EU legislation, UK legislation or common law? Discuss what you have found out with one of your learning sources. Compare your responses with the feedback given at the end of this chapter. In considering where employment legislation comes from, it is important to also mention, briefly, Statutory Codes of Practice and the European Convention on Human Rights. Statutory Codes of Practice are issued by certain statutory agencies in the UK. They are documents that have been approved by Parliament and, in many instances, have to be taken into account by courts and tribunals when hearing complaints from workers and employers. The bodies that issue Statutory Codes of Practice include Acas, the Health and Safety Executive (HSE) and the Equality and Human Rights Commission (EHRC). As seen in Chapter 8 on employee relations, it is advisable for employers to be aware of relevant statutory codes (for example, the Acas Code of Practice 1: Disciplinary and Grievance Procedures) both when writing their policies and procedures and when implementing them. The European Convention on Human Rights was incorporated into UK law in 2000, through the Human Rights Act 1998. The impact has been that common law must be compatible with human rights and previous decisions can be challenged on that basis. It means that all UK Acts of Parliament must be implemented and interpreted in line with the principles of the Convention and all public bodies (local government, hospitals, police, schools, etc) must act in accordance with the Convention. This covers all their activities – policy-making, HR matters, decision-making, and so on. So it can be seen that when considering the impact of employment legislation from the three primary sources, it is also important to have one eye on both relevant codes of practice and human rights issues. Having looked at why employment legislation is important and where it comes from, we will now look at the key components of the legislative framework that apply over the course of the employee life cycle: pre-employment/starting work; during employment; and ending employment. Pre-employment and starting work with a new employer In terms of employment legislation, the most significant issues prior to employing someone are to ensure all recruitment and selection activity promotes and upholds the principles and legal requirements around equality and diversity and to address the requirements for pre-employment checks. As any new starter joins the organisation and moves through their first few weeks of employment, the critical issues concern the offer of employment, the contract of employment, the type of contract and employment status. Equality, diversity and inclusion in recruitment and selection It is important to consider equality, diversity and inclusion at all stages and in all activities undertaken as part of any recruitment and selection process, including attracting a pool of applicants and making decisions about who to offer a job to. It is critical to ensure that any bias (including unconscious or hidden bias) that might creep into the process is removed and that no unnecessary obstacles are placed in the way of the widest possible range of applicants getting involved. Issues such as clarifying the requirements of

the job, drafting job descriptions and person specifications, deciding where to advertise and designing the selection process, including interview questions, must be considered carefully to ensure no breach of the relevant legislation and no discrimination or stereotyping. Further details of this legislation and its specific impact can be found in Chapter 5. Pre-employment checks Before making any offer of employment following a successful recruitment campaign, employers must ensure they undertake any necessary pre-employment checks. This is sometimes referred to as 'vetting' or seen as part of organisations' due diligence processes – in other words, ensuring that the organisation doesn't commit an offence. The three areas where there are legal requirements are discussed below. Right to work in the UK It is illegal for an organisation to employ foreign nationals who do not have the right to work in the UK and they could be subject to fines (at the time of writing of up to £20,000) for doing so. Employers are required to inspect and copy specified official documents that confirm identity and status – for example, a passport. There is a Code of Practice which sets out which documents are acceptable and situations where more than one document is required. Undertaking these checks in line with the Code will give an organisation a defence unless they knowingly employ an illegal worker. Knowingly employing a foreign national who does not have the right to work in the UK is a criminal offence. Employers must conduct a three-stage process to comply with the requirement to check right to work: Request and review original copies of one or two specified documents. Check as far as possible that the document(s) is genuine, relates to the worker and allows him or her to do that kind of work. Take and keep a copy of the document that cannot then be altered. This three-stage process must be completed before the individual starts work. In order to avoid falling into the trap of potential discrimination, employers should take a consistent approach to all applicants and avoid any assumptions, using the prescribed checks as the sole determinant of right to work. (The relevant legislation is the Immigration, Asylum and Nationality Act 2006, as amended by the Immigration Act 2016.) Criminal records checks In certain circumstances employers have the right to ask for a criminal records check, which is processed through the Disclosure and Barring Service (DBS). Under the Rehabilitation of Offenders Act 1974, people who have been convicted of a criminal offence can have their sentences treated as 'spent' after a certain period of time. This depends on age at the time of conviction (18 and over or not) and length of custodial sentence or other type of penalty. This means that, except in limited circumstances, the individual does not have to disclose a previous, and now 'spent', conviction to a prospective employer. There are, however, certain situations where a conviction never becomes spent and must always be disclosed. This relates to the type of job an individual is applying for and includes jobs in certain professions, those employed to uphold the law, those who work with children and vulnerable adults, and those whose work means they could pose a risk to national security (for example, health professionals, care workers, lawyers, accountants, teachers and other workers in schools, childminders and anyone who works in a prison or similar institution). Full details can be found on the DBS website. Health checks The Equality Act 2010 generally prevents employers from asking questions about health until after a job offer is made. The aim of this is to ensure recruitment decisions are made on the basis of merit and someone's ability to do the job and to ensure no conscious or unconscious bias against, for example, people with disabilities. Once a job offer is made, it can be subject to necessary health checks and questions. There are some limited

exceptions to this general rule – for example, where health issues are relevant to decide whether an applicant can do a function that is intrinsic to the job (such as asking applicants for a job as a scaffolder whether they have a disability or condition that affects their ability to climb ladders or work at height), or for the purposes of monitoring and promoting equality and diversity. In addition to these general legislative requirements in recruitment, there are also certain sector-specific requirements that go over and above the legal requirements on most employers. These include the NHS Employment Checks Standards, the Code of Practice on the Security Screening of Individuals Employed in a Security Environment, and particular checks in the financial services industry, to name three. Readers would be well advised to check whether any types of staff in their own organisations are subject to any wider checks. Reflective Activity 3.3 Consider the pre-employment checks carried out in your organisation. Are the required checks always undertaken? Who is responsible for doing them? Are there any jobs in your organisation that might require a criminal records check? (You can check this on the DBS website.) Do you know whether the general requirement not to ask health questions until after a job offer has been made, for example, by ensuring there are no health questions on your job application form, is applied? If you find any aspects of your organisation's recruitment process that are not legally compliant, prepare a report on what needs to change and how, and share it with your manager. Offer of employment Once a recruitment process has reached a successful conclusion, and all the necessary pre-employment checks have been done, a job offer will be made. It is advisable that all offers of employment are made in writing; however, readers should be aware that a verbal offer, made at interview or afterwards, is as legally binding as a written job offer. In employment, offers are often subject to issues such as the required employment checks outlined above, but also to references or verification of qualifications. In such cases, agreement is not reached until all the 'subject to' issues have been resolved. The person making the offer on behalf of an organisation must be properly authorised to do so. This is very important for you as an HR practitioner. If you offer an employment contract without proper authority, your organisation could disown the decision. This would place you in a most invidious position and almost certainly leave you liable to disciplinary action. If the rejected employee had already accepted your offer, and handed in notice in his or her current employment, he or she may seek damages. Notice that contracts do not have to be in writing. Many offers are made and accepted over the phone. If it can be established that a formal offer has been made and accepted, then an enforceable contract exists. Telephone offers are quicker and therefore reduce the danger of losing a good candidate while a written contract is being prepared. They can make negotiations easier so long as both parties are prepared for them and you have clear authority to reach an agreement. In the longer term, written offers and acceptance have the advantage that both parties know exactly what has been agreed. There is therefore less room for confusion (if references prove to be unsatisfactory, for example). Care has to be taken to be sure that an interview candidate is not led to believe an offer exists (by agreeing a pay rate, for example) when that is not the intention. Words such as 'If we were to offer you…' are important to help avoid confusion. You need to find out whether your organisation has a policy on how offers should be made, or whether you are expected to use your best judgement. Offers may be made and accepted by email. Offers can also be accepted by a person's behaviour: for example, arriving for work would

indicate acceptance. It may be helpful to place a time limit on an offer, or formally to withdraw it if it is not accepted within a satisfactory timescale. As soon as an offer of employment is accepted, then an employment contract starts. An employment contract is an agreement between an employer and employee, is legally binding and is the basis of any employment relationship. It is in many ways no different from any other contract that two parties might enter into. It is governed by contract law, and requires the elements that make any contract legally binding: An offer (of employment by the employer). Acceptance (of that offer by the employee). Consideration (something of value the parties agree to exchange to make the contract valid, for example, the work done by the employee in return for the wages paid by the employer). Intention (to create a legally binding arrangement). We will now look at employment contracts in more detail. Contracts of employment The contract sets out the legal basis of the employment relationship. It should therefore include those matters on which you wish your employee to be legally bound and matters on which you, as an employer, will be legally bound. For example, you may want to legally bind an employee to your business hours. If there is a clear written agreement specifying this as part of the contract, the hours become contractual. On the other hand, there will be matters that you do not wish to be legally binding. Typically, disciplinary and grievance procedures are not part of the contract and it is advisable for only the minimum details required to be referred to in the written particulars (described below). You may have good reason to use judgement in operating disciplinary and grievance procedures. If such procedures are contractual, a failure to follow them to the letter can result in a breach of contract claim. For example, if grievance procedures are part of the contract, and you refuse to use them when an employee raises a grievance, the employee might claim that you have dismissed him or her by breaching the contract (known as constructive dismissal). In this case the employee could sue for damages such as entitlement to notice pay. He or she would be claiming wrongful dismissal – that is, dismissal in breach of the contract. The employee might also claim unfair dismissal, if he or she is entitled to do so. We will look at constructive and unfair dismissal again later. It is also important to remember that contracts cannot be changed unilaterally. To vary a contract, both parties have to agree to the change. It is impossible to predict every possible employment situation that can arise. In some areas judgement or discretion is needed; therefore some matters should as far as possible not be contractual. Typical examples might be bonus scheme rules, job descriptions and policies and procedures. For the employer, gauging the degree of flexibility that should exist in the employment relationship is an important decision and requires careful judgement, although the final decision as to whether a particular term is contractual or not may rest with the courts. Just to clarify the issue further, let's take the example of job descriptions. If you include a job description in an employment contract, every variation in the duties of the job can, potentially, become a legal issue. For this reason it is advisable to specify only the job title when making a contract. (Indeed, technically, even this could be left for the written particulars – see below.) Similarly, there is no requirement to include a job description in the written particulars. There is actually no legal need to have a job description at all, although, as discussed in Chapter 5, it may be good practice to do so. The degree of formality involved in job descriptions affects an employer's flexibility to a significant degree. At one extreme, a lot of formality (job descriptions signed, or included in the contract) tends to encourage disputes over duties. Such disputes

can focus on wording rather than the purpose of the job or the interests of the parties concerned. At the other extreme, complete informality (no job descriptions) may aid early resolution but can make it much more difficult if relationships do eventually break down. In informal situations it is easy for the employer to have one expectation about the employee's responsibilities and for the employee to have another. This brings us to the distinction between statutory, implied and express terms in employment contracts. Statutory matters are not usually written into the employment contract but override other terms. This also means that they apply whether the After reading this chapter you will: Know which legislation is likely to apply in the main areas of HR activity. Be able to discuss relevant legislation and requirements in discussions with managers and legal specialists. Be able to respond to the fundamental legal expectations placed on employers. Recognise the limitations of your knowledge and know where to find further information. Have an understanding of the basic employment legislation affecting HR practice, including employment contracts, individual employment rights, equality, diversity and inclusion, and ending the employment relationship. Introduction In this chapter we'll be considering the legal framework that underpins and regulates the formal employment relationship between employers and their employees and workers. First we'll consider why employment legislation is important for HR practitioners, how employment legislation is made and where it comes from. Next we'll use the concept of the employee life cycle as a framework to consider what legislation is relevant whilst recruiting, selecting and appointing employees (see Pre-employment and starting work), then how employment legislation impacts during employment, with a particular focus on individual employee rights, and finally what legislation is relevant as the employment relationship comes to an end (see Ending employment). We will then end by looking at how disputes about employment rights and legislation are dealt with and the role of HR practitioners. Whilst considering the impact of employment legislation on the formal employment relationship it is also important to be aware that legislation and other statutory regulation (areas that you may come across later in your HR career) also plays a much wider role in the employment field. This is often influenced by political, social and economic changes in society more widely – think about the requirement for gender pay gap reporting that now applies in many organisations. Consider the impact free movement of people around the EU has had on recruitment practice and cultural equality and diversity and what will happen when this free movement comes to an end. Why is legislation important? In the employment relationship there is usually an imbalance of power – in favour of the employer. Having employment legislation in place ensures this imbalance is not exploited and regulates the employment relationship. It affords rights to employees that, in some organisations, may not otherwise exist. Employment law also serves to reinforce values in society and create workplace cultures that support the direction of travel in the wider world – think, for example, of the evolution of equality law from a narrow focus on sex and race discrimination to a much wider focus now, mirroring societal changes. For example, equality law now applies to sexual orientation and gender reassignment. Many employers view employment legislation as a helpful framework to refer to when managing employees, although some feel that bringing the law into employment relationships creates rigidity and sometimes makes it difficult for the business to be agile and respond to opportunities. Employees often feel that the law provides a degree of protection from poor management and

exploitation, such as in the recent debates about zero-hours contracts, but doesn't necessarily go far enough. Many other feelings surround the question of law and employment. Some may arise from political beliefs, others from personal experience. In recent years there have been attempts by successive governments, not entirely successful, to reduce the burden of legislation on employers. However, after the United States, employment in the UK is one of the most lightly regulated regimes in the developed world. The extent to which strong feelings exist, and their relevance to HR practice, varies from organisation to organisation. Government organisations necessarily attach great importance to legal matters, whereas some entrepreneurial businesspeople may seek to minimise, or even disregard, the impact of the law on their employment practices. Other employers adopt employment practices that go over and above any minimum provided by the law. They aspire to practices that are the best that can be found, embracing the spirit as well as the letter of the law. One example, common in many larger employers, is having more generous maternity leave and pay than required by law. Knowledge and understanding of employment legislation, and its impact, is a key competence for HR practitioners and business-owners/managers alike. The law has a bearing across many areas of HR practice – recruitment, reward, employee relations, change management, wellbeing and performance management, to name a few. It is a huge area that changes rapidly and can, at times, be very specialised and complex. So, in this chapter, although we shall explain the main principles that you need to know, you are likely also to need advice from more senior colleagues, Acas, or legal and other specialists. There are more details about Acas in Chapter 2. Reflective Activity 3.1 Think about your own organisation. How do you think managers and workers view the effect of law on employment? Do managers use it to control or manage people? If so, how? Do employment rights reassure employees? What do you think of the attitudes in your organisation? Write down your thoughts and discuss them with one of your learning sources, as described in Chapter 1. A note on employees and workers You will notice that we have already used the terms 'employees' and 'workers' and have mentioned the 'employment relationship' many times. The definition of 'employee' and 'worker' is not always consistent in different pieces of legislation, but in general, the rights we are going to talk about in this chapter only apply to either employees or workers – and not, for example, to self-employed people. The majority of people in work will be employees, but the distinction between employees and workers is important because different rights apply to each. In broad terms, employees have more rights than workers, and legislation that applies to workers will normally also apply to employees, but not necessarily vice versa. The intention behind the distinction is to ensure that some rights, although not all, will apply to less typical employment arrangements such as casual workers, zero-hours workers, 'as and when required' workers, and some other types of subcontractors. There is more on this below. Where does employment legislation come from? In the UK, current employment law has come from three different places: The UK Parliament – primary legislation (Acts of Parliament, for example, the Equality Act 2010) and secondary legislation (Regulations, for example, the Working Time Regulations 1998). Tribunals and courts through case law (for example, the Employment Appeal Tribunal or the Supreme Court). European bodies (for example, the European Parliament and the European Court of Justice). Acts of Parliament generally start out as White (broad statements of policy) or Green (specific proposals and options) Papers and

Bills. They will be subject to consultation with interested parties and debate in Parliament. At the early stages of new employment legislation, consultation will often be conducted by the Department for Business, Energy & Industrial Strategy (BEIS). Once the full parliamentary process has taken place, then new legislation will appear in the form of an Act. Often for Acts relating to employment matters, there will be a phased introduction of different clauses or parts of the Act, although they will also have a formal enactment date – in the case of employment legislation usually April or October. Some of the key Acts of Parliament that apply in the employment relationship include the: Trade Union and Labour Relations (Consolidation) Act 1992. Employment Rights Act 1996. Employment Act 2002. Work and Families Act 2006. Employment Act 2008. Equality Act 2010. Children and Families Act 2014. The situation is somewhat different in relation to law that originates from the tribunals and courts – properly termed 'common law'. This common law evolves over time as cases are brought to tribunals and courts and judges make decisions or are asked to interpret a particular piece of primary or secondary legislation. Decisions by judges in higher courts must be applied by judges in lower courts. So, for instance, if an employee takes an unfair dismissal case to an employment tribunal and wins, but the employer then appeals and the case is heard by the Employment Appeal Tribunal, which overturns the decision, then in future cases of the same nature, all employment tribunals must apply the ruling/interpretation as set out by the Employment Appeal Tribunal. Common law can be overturned by a subsequent Act of Parliament. Common law is particularly important in the field of employment legislation and decisions from employment courts lead to an almost constant evolution in employment law that anyone involved in HR must be aware of. In relation to laws that originated from the European Union, there have been three main sources, which to some extent reflect the two UK-based sources outlined above. These are: Treaties which are directly enforceable in Member States (for example, the Treaty of Rome 1957, which contained the principle of equal pay for equal work). Directives which require further relevant national laws to be passed by Member States – in the UK by an Act of Parliament (for example, the European Working Time Directive was enacted as the Working Time Regulations in the UK). Rulings of the European Court of Justice, which are binding on all Member States (which, for example, led to the definition of discrimination on the grounds of pregnancy as 'direct discrimination'). It is possible to see the interaction of laws from these different sources by considering the area of working time – maximum allowable working hours per week, rest breaks, paid holidays, and so on. The European Commission introduced the Working Time Directive (WTD) in 1993. The stated aim of the WTD was to ensure the health and safety of workers and safeguard workers' rights. As a European Union (EU) Directive, it required Member States, including the UK, to enact or pass it into national law. After some reluctance in the UK, the WTD was enacted as the Working Time Regulations (WTR) 1998. These Regulations have subsequently been amended a number of times by the UK Parliament. As indicated above, as this originated in the EU and was then enacted in the UK via Regulations, this is a piece of secondary legislation. Since 1998, the WTD and WTR have been subject to a number of challenges through both UK courts and tribunals and through employment courts in other EU Member States and, ultimately, through the European Court of Justice. As challenges have been made through UK courts and tribunals and judges in these institutions have interpreted the WTR they

have made decisions which must be followed in lower courts, thus Common Law about working time has been created. So, now, employers must be aware of legislation from each of the three sources identified above, and be aware of which takes precedence, when considering matters relating to working time. A complex and complicated area of HR practice we're sure you'll agree! The position is also made more complicated by the decision for the UK to leave the EU, with the processes involved to deliver that being uncertain at the time of writing. For the foreseeable future, EU law that existed before Brexit will continue to apply after Brexit until such time as that law is changed in the UK Parliament. Reflective Activity 3.2 Consider the question of paid holiday entitlement for workers. Do some research and try to find out: How much paid holiday workers in the UK are entitled to. How bank holidays are treated. What is included in the calculation of 'pay' when working out holiday pay. What happens to holiday entitlement during sick leave and other types of leave (for example, maternity leave or shared parental leave). Can you work out where the current rules on each of these matters come from – EU legislation, UK legislation or common law? Discuss what you have found out with one of your learning sources. Compare your responses with the feedback given at the end of this chapter. In considering where employment legislation comes from, it is important to also mention, briefly, Statutory Codes of Practice and the European Convention on Human Rights. Statutory Codes of Practice are issued by certain statutory agencies in the UK. They are documents that have been approved by Parliament and, in many instances, have to be taken into account by courts and tribunals when hearing complaints from workers and employers. The bodies that issue Statutory Codes of Practice include Acas, the Health and Safety Executive (HSE) and the Equality and Human Rights Commission (EHRC). As seen in Chapter 8 on employee relations, it is advisable for employers to be aware of relevant statutory codes (for example, the Acas Code of Practice 1: Disciplinary and Grievance Procedures) both when writing their policies and procedures and when implementing them. The European Convention on Human Rights was incorporated into UK law in 2000, through the Human Rights Act 1998. The impact has been that common law must be compatible with human rights and previous decisions can be challenged on that basis. It means that all UK Acts of Parliament must be implemented and interpreted in line with the principles of the Convention and all public bodies (local government, hospitals, police, schools, etc) must act in accordance with the Convention. This covers all their activities – policy-making, HR matters, decision-making, and so on. So it can be seen that when considering the impact of employment legislation from the three primary sources, it is also important to have one eye on both relevant codes of practice and human rights issues. Having looked at why employment legislation is important and where it comes from, we will now look at the key components of the legislative framework that apply over the course of the employee life cycle: pre-employment/starting work; during employment; and ending employment. Pre-employment and starting work with a new employer In terms of employment legislation, the most significant issues prior to employing someone are to ensure all recruitment and selection activity promotes and upholds the principles and legal requirements around equality and diversity and to address the requirements for pre-employment checks. As any new starter joins the organisation and moves through their first few weeks of employment, the critical issues concern the offer of employment, the contract of employment, the type of contract and employment status. Equality, diversity and inclusion in recruitment and selection It is

important to consider equality, diversity and inclusion at all stages and in all activities undertaken as part of any recruitment and selection process, including attracting a pool of applicants and making decisions about who to offer a job to. It is critical to ensure that any bias (including unconscious or hidden bias) that might creep into the process is removed and that no unnecessary obstacles are placed in the way of the widest possible range of applicants getting involved. Issues such as clarifying the requirements of the job, drafting job descriptions and person specifications, deciding where to advertise and designing the selection process, including interview questions, must be considered carefully to ensure no breach of the relevant legislation and no discrimination or stereotyping. Further details of this legislation and its specific impact can be found in Chapter 5. Pre-employment checks Before making any offer of employment following a successful recruitment campaign, employers must ensure they undertake any necessary pre-employment checks. This is sometimes referred to as 'vetting' or seen as part of organisations' due diligence processes – in other words, ensuring that the organisation doesn't commit an offence. The three areas where there are legal requirements are discussed below. Right to work in the UK It is illegal for an organisation to employ foreign nationals who do not have the right to work in the UK and they could be subject to fines (at the time of writing of up to £20,000) for doing so. Employers are required to inspect and copy specified official documents that confirm identity and status – for example, a passport. There is a Code of Practice which sets out which documents are acceptable and situations where more than one document is required. Undertaking these checks in line with the Code will give an organisation a defence unless they knowingly employ an illegal worker. Knowingly employing a foreign national who does not have the right to work in the UK is a criminal offence. Employers must conduct a three-stage process to comply with the requirement to check right to work: Request and review original copies of one or two specified documents. Check as far as possible that the document(s) is genuine, relates to the worker and allows him or her to do that kind of work. Take and keep a copy of the document that cannot then be altered. This three-stage process must be completed before the individual starts work. In order to avoid falling into the trap of potential discrimination, employers should take a consistent approach to all applicants and avoid any assumptions, using the prescribed checks as the sole determinant of right to work. (The relevant legislation is the Immigration, Asylum and Nationality Act 2006, as amended by the Immigration Act 2016.) Criminal records checks In certain circumstances employers have the right to ask for a criminal records check, which is processed through the Disclosure and Barring Service (DBS). Under the Rehabilitation of Offenders Act 1974, people who have been convicted of a criminal offence can have their sentences treated as 'spent' after a certain period of time. This depends on age at the time of conviction (18 and over or not) and length of custodial sentence or other type of penalty. This means that, except in limited circumstances, the individual does not have to disclose a previous, and now 'spent', conviction to a prospective employer. There are, however, certain situations where a conviction never becomes spent and must always be disclosed. This relates to the type of job an individual is applying for and includes jobs in certain professions, those employed to uphold the law, those who work with children and vulnerable adults, and those whose work means they could pose a risk to national security (for example, health professionals, care workers, lawyers, accountants, teachers and other workers in schools, childminders and anyone who works in a prison or

similar institution). Full details can be found on the DBS website. Health checks The Equality Act 2010 generally prevents employers from asking questions about health until after a job offer is made. The aim of this is to ensure recruitment decisions are made on the basis of merit and someone's ability to do the job and to ensure no conscious or unconscious bias against, for example, people with disabilities. Once a job offer is made, it can be subject to necessary health checks and questions. There are some limited exceptions to this general rule – for example, where health issues are relevant to decide whether an applicant can do a function that is intrinsic to the job (such as asking applicants for a job as a scaffolder whether they have a disability or condition that affects their ability to climb ladders or work at height), or for the purposes of monitoring and promoting equality and diversity. In addition to these general legislative requirements in recruitment, there are also certain sector-specific requirements that go over and above the legal requirements on most employers. These include the NHS Employment Checks Standards, the Code of Practice on the Security Screening of Individuals Employed in a Security Environment, and particular checks in the financial services industry, to name three. Readers would be well advised to check whether any types of staff in their own organisations are subject to any wider checks. Reflective Activity 3.3 Consider the pre-employment checks carried out in your organisation. Are the required checks always undertaken? Who is responsible for doing them? Are there any jobs in your organisation that might require a criminal records check? (You can check this on the DBS website.) Do you know whether the general requirement not to ask health questions until after a job offer has been made, for example, by ensuring there are no health questions on your job application form, is applied? If you find any aspects of your organisation's recruitment process that are not legally compliant, prepare a report on what needs to change and how, and share it with your manager. Offer of employment Once a recruitment process has reached a successful conclusion, and all the necessary pre-employment checks have been done, a job offer will be made. It is advisable that all offers of employment are made in writing; however, readers should be aware that a verbal offer, made at interview or afterwards, is as legally binding as a written job offer. In employment, offers are often subject to issues such as the required employment checks outlined above, but also to references or verification of qualifications. In such cases, agreement is not reached until all the 'subject to' issues have been resolved. The person making the offer on behalf of an organisation must be properly authorised to do so. This is very important for you as an HR practitioner. If you offer an employment contract without proper authority, your organisation could disown the decision. This would place you in a most invidious position and almost certainly leave you liable to disciplinary action. If the rejected employee had already accepted your offer, and handed in notice in his or her current employment, he or she may seek damages. Notice that contracts do not have to be in writing. Many offers are made and accepted over the phone. If it can be established that a formal offer has been made and accepted, then an enforceable contract exists. Telephone offers are quicker and therefore reduce the danger of losing a good candidate while a written contract is being prepared. They can make negotiations easier so long as both parties are prepared for them and you have clear authority to reach an agreement. In the longer term, written offers and acceptance have the advantage that both parties know exactly what has been agreed. There is therefore less room for confusion (if references prove to be unsatisfactory, for example). Care has to be taken to

be sure that an interview candidate is not led to believe an offer exists (by agreeing a pay rate, for example) when that is not the intention. Words such as 'If we were to offer you…' are important to help avoid confusion. You need to find out whether your organisation has a policy on how offers should be made, or whether you are expected to use your best judgement. Offers may be made and accepted by email. Offers can also be accepted by a person's behaviour: for example, arriving for work would indicate acceptance. It may be helpful to place a time limit on an offer, or formally to withdraw it if it is not accepted within a satisfactory timescale. As soon as an offer of employment is accepted, then an employment contract starts. An employment contract is an agreement between an employer and employee, is legally binding and is the basis of any employment relationship. It is in many ways no different from any other contract that two parties might enter into. It is governed by contract law, and requires the elements that make any contract legally binding: An offer (of employment by the employer). Acceptance (of that offer by the employee). Consideration (something of value the parties agree to exchange to make the contract valid, for example, the work done by the employee in return for the wages paid by the employer). Intention (to create a legally binding arrangement). We will now look at employment contracts in more detail. Contracts of employment The contract sets out the legal basis of the employment relationship. It should therefore include those matters on which you wish your employee to be legally bound and matters on which you, as an employer, will be legally bound. For example, you may want to legally bind an employee to your business hours. If there is a clear written agreement specifying this as part of the contract, the hours become contractual. On the other hand, there will be matters that you do not wish to be legally binding. Typically, disciplinary and grievance procedures are not part of the contract and it is advisable for only the minimum details required to be referred to in the written particulars (described below). You may have good reason to use judgement in operating disciplinary and grievance procedures. If such procedures are contractual, a failure to follow them to the letter can result in a breach of contract claim. For example, if grievance procedures are part of the contract, and you refuse to use them when an employee raises a grievance, the employee might claim that you have dismissed him or her by breaching the contract (known as constructive dismissal). In this case the employee could sue for damages such as entitlement to notice pay. He or she would be claiming wrongful dismissal – that is, dismissal in breach of the contract. The employee might also claim unfair dismissal, if he or she is entitled to do so. We will look at constructive and unfair dismissal again later. It is also important to remember that contracts cannot be changed unilaterally. To vary a contract, both parties have to agree to the change. It is impossible to predict every possible employment situation that can arise. In some areas judgement or discretion is needed; therefore some matters should as far as possible not be contractual. Typical examples might be bonus scheme rules, job descriptions and policies and procedures. For the employer, gauging the degree of flexibility that should exist in the employment relationship is an important decision and requires careful judgement, although the final decision as to whether a particular term is contractual or not may rest with the courts. Just to clarify the issue further, let's take the example of job descriptions. If you include a job description in an employment contract, every variation in the duties of the job can, potentially, become a legal issue. For this reason it is advisable to specify only the job title when making a contract. (Indeed, technically, even this could be

left for the written particulars – see below.) Similarly, there is no requirement to include a job description in the written particulars. There is actually no legal need to have a job description at all, although, as discussed in Chapter 5, it may be good practice to do so. The degree of formality involved in job descriptions affects an employer's flexibility to a significant degree. At one extreme, a lot of formality (job descriptions signed, or included in the contract) tends to encourage disputes over duties. Such disputes can focus on wording rather than the purpose of the job or the interests of the parties concerned. At the other extreme, complete informality (no job descriptions) may aid early resolution but can make it much more difficult if relationships do eventually break down. In informal situations it is easy for the employer to have one expectation about the employee's responsibilities and for the employee to have another. This brings us to the distinction between statutory, implied and express terms in employment contracts. Statutory matters are not usually written into the employment contract but override other terms. This also means that they apply whether the